IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.A.ABDUL GAFOOR

WEDNESDAY, THE 6TH DECEMBER 2006 / 15TH AGRAHAYANA 1928

WP(C).No. 7035 of 2005(K)

{O.S.NO.2/2000 OF THE 1ST ADDITIONAL DISTRICT COURT, TRIVANDRUM}

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PETITIONER:

C.C.ABRAHAM, S/O.CHERIYAN, CHERUVALLATH HOUSE, THANKAMALA ESTATE, KEEZHARIYOOR, KOZHIKODE.

BY ADV. SRI.R.K.MURALEEDHARAN
SRI.R.PARTHASARATHY

RESPONDENTS:

1. ANTONY MATHEW, S/O.ANTONY, T.C. 14/352-I, VIKAS BHAVAN P.O,. THIRUVANANTHAPURAM.

2. REV.DR.P.V.JOSE PALLISSERY, REP. BY HIS POWER OF ATTORNEY HOLDER ANTONY MATHEW, T.C. NO.14/352-I, OTTAPPLACKAL, VIKAS BHAVAN P.O. THIRUVANANTHAPURAM.

3. N.A.KARIM, 21, INDIRA NAGAR, PEROORKKADA, THIRUVANANTHAPURAM.

4. M.RAJALAKSHMI @ MINI, AKSHARA OFFSET PRESS, JYOTHIS, VANCHIYOOR, THIRUVANANTHAPURAM 35.

R4 BY ADV. SRI.V.PHILIP MATHEW

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 06/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS:

EXT.P1: TRUE COPY OF THE PLAINT IN O.S.2/2000 FILED BY THE 2ND RESPONDENT BEFORE THE DIST. COURT, TVM. DTD. 3.1.2000.

EXT.P2: TRUE COPY OF THE PLAINT IN O.S.2/99 FILED BY THE 1ST RESPONDENT DTD. 6.4.99.

EXT.P3: TRUE COPY OF THE AFFIDAVIT IN I.A.2161/04 IN O.S.2/2000 DTD. 9.9.04.

EXT.P4: TRUE COPY OF THE COUNTER AFFIDAVIT FILED IN I.A.2161/2004 IN O.S.2/2000 DATED 26.11.2004.

EXT.P5: TRUE COPY OF THE ORDER OF ADDL.DIST.JUDGE IN I.A.2161/04 IN O.S.2/2000 DT. 4.12.04.

RESPONDENTS' EXHIBITS: NIL

//true copy//

P.S. To Judge

K.A.ABDUL GAFOOR, J.

W.P.(C)No.7035 of 2005

Dated this the 6th day of December, 2006.

JUDGMENT

The first defendant in O.S.No.2/00 on the file of the District Court, Thiruvananthapuram is the petitioner herein. He is aggrieved by Ext.P5 order passed by the court below, at the instance of the 4th defendant in that suit, whereby the 4th defendant is transposed as the plaintiff.

2. It is submitted by the petitioner that the reason stated in Ext.P3 petition seeking such transposition is that the plaintiff had gone abroad and had executed a Power of Attorney in favour of the 4th defendant and therefore, the 4th defendant may be transposed as the plaintiff. It is submitted by the petitioner that the condition mentioned in Order XXIII Rule 1-A of the Code of Civil Procedure enabling a court to transpose the defendant as the plaintiff is not gone into while passing Ext.P5. The court below was

carried away by the fact that the 4th defendant had claimed authorship of the dictionary against the petitioner herein and therefore, he had a joint claim along with the plaintiff in the suit. That cannot be a reason to transpose the 4th defendant as the plaintiff.

3. It is true that the suit in question is for injunction and for rendering accounts claiming copy right of N.E.R.C. Dictionary for speakers of Malayalam. It is also submitted that the 4th defendant had claimed authorship of the said dictionary as against the claim of the writ petitioner and had filed a suit O.S.No.2/99. But that shall not be a reason for transposing him as the plaintiff in O.S.No.2/00 merely on the ground that the plaintiff therein had gone abroad and executed a Power of Attorney to conduct the suit. The averment in Ext.P3 petition filed by the 4th defendant reveals that the original plaintiff had executed a Power of Attorney in

his favour to conduct the suit. Therefore, the plaintiff in O.S.No.2/00, even after going abroad, had not abandoned the suit. Order XXIII Rule 1-A of the Code of Civil Procedure reads as follows:

> **"1-A. When transposition of defendants as plaintiffs may be permitted -** *Where a suit is withdrawn or abandoned by a plaintiff under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 of Order 1, the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants."*

3. The transposition of a defendant as plaintiff is permitted under this rule only if the suit is withdrawn or abandoned by the plaintiff. Only in such circumstance, a defendant can apply to be transposed as a plaintiff. The averment of the 4th defendant in Ext.P3 petition, to transpose him as the

plaintiff, reveals that the original plaintiff, though had left for abroad, had not abandoned the suit, but had consciously executed a Power of Attorney in favour of the 4th defendant to prosecute the suit. Therefore, there was neither an abandonment nor withdrawal. In such circumstances, the condition in Rule 1-A of Order XXIII extracted above, is not satisfied to enable the court below to transpose the 4th defendant as the plaintiff. That the 4th defendant had a claim jointly with the original plaintiff is not a reason for transposing him as the plaintiff. But, as the suit is neither withdrawn nor abandoned, it shall have to be continued, until it is disposed of in accordance with law.

Accordingly, Ext.P5 is set aside. Writ petition is allowed as above.

Sd/-

(K.A.ABDUL GAFOOR)
JUDGE

sk/

K.A.ABDUL GAFOOR , J.

W.P.(C)No.7035 of 2005

"C.R"

JUDGMENT

6th December, 2006.